

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,)	
)	
Plaintiff,)	No. CR-15-1723-TUC-RCC-DTF
)	
vs.)	Tucson, Arizona
)	April 4, 2018
Lonnie Ray Swartz,)	4:10 p.m.
)	
Defendant.)	
)	

BEFORE: THE HONORABLE RANER C. COLLINS, JUDGE

REPORTER'S EXCERPTED TRANSCRIPT OF PROCEEDINGS

JURY TRIAL
Day 10

(TESTIMONY OF EMMA LEW)

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CR-15-1723-TUC-RCC - April 4, 2018

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CR-15-1723-TUC-RCC - April 4, 2018

I N D E XGOVERNMENT WITNESS: DIRECT CROSS REDIRECT RECROSS

EMMA LEW

By Ms. Feldmeier

4

Discussion Held at Sidebar

33

INDEX OF EXHIBITSEXHIBITIDENTRECEIVEDNO. DESCRIPTION278 Lew, Emma - Forensic Pathology
Consultant Report

13

279 Lew, Emma - GSW Diagram

13

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302 Diagram of GSW's
10 entry wounds with pictures

16

308 Diagram of GSW's - 10
exit/extracted wounds w/pictures

16

381 Grey mannequin

15

~~Emma Lew - Direct Examination~~

1 (The following excerpt is the testimony of Emma Lew.)

2 THE COURT: Miss Lew, come on up.

3 THE CLERK: Raise your right hand, please.

4 (EMMA LEW, GOVERNMENT WITNESS, SWORN.)

5 THE CLERK: Thank you. Please be seated. 16:10:24

6 Please pull the microphone over to you. Speak
7 directly into it.

8 State your name for the record and spell your last
9 name.

10 THE WITNESS: Yes. My name is Emma Lew, L-E-W. 16:10:47

11 DIRECT EXAMINATION

12 BY MS. FELDMEIER

13 Q. Where are you employed?

14 A. I am employed with the Miami Dade County Medical Examiner
15 Department in Miami, Florida. 16:11:01

16 Q. And what is your job description?

17 A. I am actually the Chief Medical Examiner for the Medical
18 Examiner Department.

19 Q. Okay.

20 THE COURT: Doctor, could you move that mic in front
21 of your mouth more? You're turning away from it as you speak. 16:11:11

22 THE WITNESS: I'm sorry, Your Honor. I'll try.

23 BY MS. FELDMEIER:

24 Q. There. You good?

25 A. Yes.

~~Emma Lew - Direct Examination~~

1 Q. And how long have you been with the Medical Examiner's
2 Office in Miami Dade?

3 A. Since July 1st of 1991.

4 Q. And what did you do before that?

5 A. Before that I worked for three years as a staff pathologist 16:11:31
6 at the Royal University in my home city of Saskatoon,
7 Saskatchewan, Canada.

8 Q. And where did go to school?

9 A. I went to medical school in Saskatoon, Saskatchewan. Did a
10 one-year rotating internship in Vancouver, British Columbia. 16:11:49
11 And that is also where I started my four-year residency
12 straining in pathology.

13 Q. And what is pathology?

14 A. Pathology is the practice of medicine using laboratory
15 techniques such as the autopsy. 16:12:07

16 Q. And does pathology necessarily mean a dead body?

17 A. No, there are other branches of pathology, like chemistry,
18 microbiology, hematology, and then there's anatomical
19 pathology.

20 Q. Okay. And so you focus, however, on the examination of a 16:12:24
21 deceased person; correct?

22 A. That was part of my training, yes. And now I'm totally
23 focused on examination of dead bodies.

24 Q. Okay. And approximately how many autopsies do you think
25 you've done in your -- well how many have you done at Miami 16:12:41

Emma Lew - Direct Examination

1 Dade?

2 A. In Miami Dade County jurisdiction I have conducted at least
3 5,000 autopsies.

4 Q. And prior to that?

5 A. Prior to that, close to 1,000 autopsies in -- mostly
6 in -- well, in Canada, in England, in some of the Caribbean
7 nations who do not have their own forensic pathologist.

16:12:51

8 Q. Have you ever done consulting work?

9 A. Yes, I have.

10 Q. What's consulting?

16:13:11

11 A. Consulting is when someone, whether it be law enforcement
12 or the county attorney or the state attorney or the United
13 States Attorney, or private attorneys, want an opinion from a
14 forensic pathologist.

15 Q. And so in this case did the United States Attorney's Office
16 hire you to review the evidence in this case?

16:13:32

17 A. Yes, they did.

18 Q. And with the ultimate idea in mind of giving us some
19 guidance and opinions on the cause of death and perhaps the
20 order of certain gunshot wounds?

16:13:49

21 A. Yes.

22 Q. Now, do you have any special interests in gunshot wounds?

23 A. I do. I enjoy, if that's the right word, working on
24 gunshot wound cases. It's intellectually satisfying to me.

25 Q. Have you ever trained in gunshot wound cases?

16:14:09

~~Emma Lew - Direct Examination~~

1 A. As a forensic pathologist, all of us train in gunshot
2 wounds.

3 Q. And do you train other people in gunshot wounds?

4 A. Yes. The Miami Dade County Medical Examiner Department is
5 a training facility for pathologists who want to subspecialize
6 in forensic pathology. 16:14:24

7 Q. And so you've had an opportunity to train others on the
8 examination of gunshot wounds in deceased persons?

9 A. Yes.

10 Q. Have you had an opportunity to publish in that area? 16:14:36

11 A. Yes, I have. I am co-author and co-editor of a forensic
12 biology textbook, and I wrote the chapter on gunshot wounds.
13 And I've written a few papers on gunshot wounds.

14 Q. Have you had the opportunity to work on victims that have
15 suffered gunshot wounds? 16:15:00

16 A. Yes. The most recent one was March 30th, last Friday.

17 Q. Okay. So you are obviously actively performing autopsies
18 as part of your job.

19 A. Yes, that is correct.

20 Q. Now, let's talk a little bit about your reimbursement for
21 your work here on this case. 16:15:15

22 Is the United States Attorney's Office paying an
23 amount for your hours of testimony?

24 A. Yes, they are.

25 Q. How much approximately per hour? 16:15:29

~~Emma Lew - Direct Examination~~

1 A. For testimony, about \$330 an hour.

2 Q. And then for your consultation and your review of the
3 files, approximately how much an hour?

4 A. I believe just over \$100 an hour.

5 Q. Do you see any of that money?

16:15:44

6 A. I will bill, but all the money goes back to the Miami Dade
7 County Medical Examiner Department.

8 Q. And so you will simply receive your salary?

9 A. Yes.

10 Q. And they don't pay you overtime, do they?

16:15:57

11 A. I work a lot of overtime, but I never get paid for it.

12 Q. All right. In preparation to help you review this case,
13 did the United States provide you with what's been listed in
14 your report as four pages of items?

15 A. Yes, four pages of 30 items.

16:16:16

16 Q. Okay. Could -- I guess at the risk of kind of boring the
17 jury here, could you please go over what items you were
18 provided?

19 And you don't have to probably get into the specifics
20 on that number 1.

16:16:36

21 A. Number 1 is list of folders containing photographs, and
22 they are of various items, including the crime scene.

23 Number 2 is the Mexican autopsy report. There were
24 two separate translations provided to me.

25 Number 3 is the Mexican toxicology report.

16:16:57

~~Emma Lew - Direct Examination~~

1 Number 4 is Mexican Harrison report.

2 Number 5 is the Mexican Walker test report.

3 Number 6 is the Mexican comparative forensic
4 ballistics reports -- report.

5 Number 7 is the birth and death certificates of
6 Mr. Jose Elena Rodriguez.

16:17:15

7 Number 8 is a memorandum of interview of Dr. Diaz
8 Trejo and Dr. Madrigal Godinez, with attachments and
9 photographs.

10 Number 9 is a memorandum of interview of Manuel Diaz
11 Osuna with photographs.

16:17:42

12 Number 10 is memorandums of interview of Juan Pablo
13 Espinoza Armenta.

14 Number 11 is a memorandum of interview of Blas Cota
15 Mendez with diagrams and photographs.

16:18:05

16 Number 12 is the Mexican crime scene report with
17 attached photographs.

18 Number 13 is the Mexican crime scene color photographs
19 taken on October 12th, 2012.

20 Number 14 is Border Patrol Critical Incident Team
21 Total Station diagram and evidence list.

16:18:19

22 Number 15 is a list of folders containing various
23 files created by forensic animator James Tavernetti.

24 Number 16 is a memorandum of interview that contains a
25 timeline chronology of the events captured on the videos in the

16:18:44

— Emma Lew - Direct Examination —

1 Tavernetti file.

2 Q. Is that Tavernetti file specifically the side-by-side
3 video?

4 A. Yes, it is.

5 Q. Okay.

16:18:57

6 A. Number 17 is Lucien and Michael Haag December 20, 2014
7 illustrated report.

8 And number 18 is August 19, 2014, scene work by both
9 Michael and Luke Haag.

10 Number 19 is Lucien Haag illustrated supplemental
11 report from August 19 of 2014.

16:19:15

12 Number 20 is Michael Haag September 24, 2014
13 supplemental report.

14 Number 21 is Michael Haag December 24th, 2014
15 supplemental report. This one is on the projectile
16 examination. The previous one, number 20, was the laser -- 3D
17 laser scanning of the shooting scene.

16:19:35

18 Number 22 is Lucien Haag biographical information.

19 Number 23 is Michael Haag curriculum vitae.

20 Number 24 is Bevel, Gardner & Associates forensic
21 blood spatter report, with attached Tom Bevel biographical data
22 and CV.

16:19:59

23 Q. Now as I'm listening to you, Dr. Lew, we have then e-mailed
24 disclosure and items sent via USA Affects, which is the United
25 States Attorney's Dropbox; correct?

16:20:22

Emma Lew - Direct Examination

1 A. Yes.

2 Q. And I'm looking at the names of the things listed here.

3 And are those similar -- they appear to be the same photographs
4 you just read out as number 1, and then some of Tavernetti's
5 exhibits; is that correct?

16:20:37

6 A. Yes.

7 Q. Okay. And specifically, and maybe of interest here, what
8 were the primary pieces of evidence that you focused on? What
9 was the -- actually the first thing you opened?

10 A. I honestly don't remember the first thing I opened. This
11 was a few months ago last year. But the things I focused on
12 and were most helpful to me were the translated autopsy reports
13 and the photographs from both the crime scene and the autopsy.

16:20:51

14 Q. Did you also have an opportunity to view the Border Patrol
15 camera videos?

16:21:12

16 A. Yes, I did.

17 Q. Then after you made your reviews, did you have -- did
18 you -- did you have additional information that's listed on
19 page 4 at the bottom?

20 A. Yes, I did.

16:21:31

21 Q. What date was that additional information received?

22 A. On August the 7th, 2017.

23 Q. Would that be August 2nd?

24 Am I reading that right, August 2, 2017?

25 A. Oh, yes, I'm sorry.

16:21:50

—Emma Lew - Direct Examination—

1 On August the 2nd, 2017, I had the opportunity to
2 actually visit the U.S. Mexico border in Nogales, Arizona where
3 the scene took place. And I was able to interview Dr. Madrigal
4 and Dr. Diaz through an interpreter.

5 Q. Then after that did the United States pose four questions
6 to you? 16:22:14

7 A. Yes, they did.

8 Q. And so did that guide in some ways the areas that you were
9 going to explore in your consultation?

10 A. Yes, they did. 16:22:29

11 Q. And what were the four questions that were asked of you?

12 A. Number 1, which of the ten bullets that struck Jose Elena
13 was fatal bullet or bullets.

14 Number 2, when in sequence was the fatal bullet or
15 bullets inflicted during the course of the discharge of the
16 firearm by the defendant? 16:22:47

17 Number 3, which gunshot wounds were inflicted when the
18 victim was alive, and which, if any, were inflicted after
19 death?

20 Number 4, was the victim's movement between his
21 initial contact with the pavement, in brackets, left face
22 abrasions and injuries to the back of his hands, close
23 parenthesis, and his final resting position as documented in
24 the crime scene photographs consistent with antemortem
25 voluntary movement or postmortem spasmodic involuntary 16:23:01
16:23:25

— Emma Lew - Direct Examination —

1 movement.

2 Q. So after you took all of the questions, the evidence into
3 consideration, did you generate a report?

4 A. Yes, I did.

5 Q. Okay. So I'm showing you --

16:23:39

6 (Discussion off the record between counsel.)

7 BY MS. FELDMEIER:

8 Q. I'm showing you what's been marked as 278.

9 Do you recognize that?

10 A. Yes, I do.

16:24:15

11 Q. What is it?

12 A. One of these is my report that I generated after reviewing
13 all of the information provided to me.

14 The second one is a body diagram that I made notes on.

15 Q. Okay. And the body diagram, is that labeled Exhibit 279?

16:24:31

16 A. Yes it is.

17 Q. And tell us how you went about doing -- or producing this
18 body diagram, Exhibit 279.

19 A. After reviewing the autopsy report and the autopsy
20 photographs, I was able to create this diagram showing the
21 location of the gunshot wounds. Actually the location of the
22 exit wounds, where the bullets came out of the body, as well as
23 the entrance wounds, where the bullet went into the body, and I
24 also was able to place the location of projectiles or bullets
25 that were found in the body.

16:24:53

16:25:18

—Emma Lew - Direct Examination—

1 Q. And was this diagram useful to you in determining the
2 potential trajectories of the bullets?

3 A. Yes.

4 Q. And in determining the answers to the questions that were
5 asked of you.

16:25:33

6 A. Yes.

7 MS. FELDMEIER: At this time I'd move the admission of
8 Exhibit 279, the diagram.

9 MR. CHAPMAN: The diagram I have no objection to.

10 THE COURT: It can be admitted.

16:25:48

11 (Exhibit No. 279 admitted into evidence.)

12 MS. FELDMEIER: Can that be published to the jury,
13 please?

14 BY MS. FELDMEIER:

15 Q. I noticed you have on 279 a little -- what's the word I'm
16 looking for, index -- down at the bottom.

16:25:52

17 What are you trying to explain by the various colors?

18 A. I was trying to explain what my markings were on the body
19 diagram, with a round circle to indicate an entrance wound,
20 where the bullet entered the body, an X for exit wounds where
21 bullets came out of the body, and a yellow dot to indicate
22 where projectiles were found inside the body.

16:26:19

23 Q. Now, would it be helpful to explain to the jury the various
24 wounds in this case by going wound by wound?

25 A. Yes, it would.

16:26:50

~~Emma Lew - Direct Examination~~

1 Q. And would it be useful to you to use a figure of a human, a
2 foam figure, so that you can place the various wounds on that
3 figure?

4 A. Yes.

5 Q. Are you -- would you also be able to demonstrate for us the 16:27:04
6 trajectory of each of the wounds by using certain knitting
7 needles that I have here with me, that you could place in the
8 body according to the descriptions in the autopsy report?

9 A. Yes.

10 MS. FELDMER: Your Honor, at this time I would 16:27:20
11 request the ability to use a mannequin that we have actually
12 labeled as the next exhibit, I think it's 381.

13 THE COURT: You mean the mannequin that's being
14 brought in the back?

15 MS. FELDMER: That one. 16:27:43

16 And to have Dr. Lew step down from the podium as we go
17 through the various wounds. And I will provide her with a
18 microphone.

19 THE COURT: You may step down.

20 THE WITNESS: Thank you, Your Honor. 16:28:01

21 BY MS. FELDMER:

22 Q. Okay. Dr. Lew, I'm going to give you this microphone. It
23 needs to stay pretty close.

24 Could you position with Agent Arrasmith here where you
25 would like this? 16:28:13

—Emma Lew - Direct Examination—

1 A. That is fine.

2 Thank you.

3 MS. FELDMEIER: The mannequin is Exhibit 381.

4 If I could also request that Exhibits No. 302 and 308
5 be brought into the courtroom. They previously have been
6 admitted. And they would be placed on an easel.

16:28:33

7 (Discussion held off the record.)

8 MS. FELDMEIER: If there's anyone in the jury who
9 cannot see the demonstratives, please raise your hand and we'll
10 move them.

16:29:49

11 BY MS. FELDMEIER:

12 Q. All right. Dr. Lew, which bullet wound should we start
13 with?

14 A. What I can do is just start from the top of the body and
15 work my way down, and show where the gunshot wounds were on the
16 body, and the pathways through the body as described by the
17 Mexican pathologists in their autopsy report.

16:30:02

18 The -- Dr. Madrigal and Dr. Diaz described the outside
19 of the body, then they described the inside of the body.

20 For us in the United States we have additional
21 information that we must obtain from the body. We follow the
22 track of each bullet from its entrance on the skin right
23 through the body to either an exit wound where it came out of
24 the body or to where a projectile stays in the body.

16:30:31

25 So although that was not done in this particular case,

16:30:52

~~Emma Lew - Direct Examination~~

1 because of my experience I was able to do that.

2 So I'm going to show you the pathways, as I understand
3 them, based on my experience and based on the information given
4 to me by the Mexican pathologists' report, autopsy report,
5 guided by their photographs as well. 16:31:14

6 Q. And, Dr. Lew, is it standard in the medical profession to
7 start examining a body from the head and working your way down?

8 A. I just find that's convenient, rather than go all over the
9 place. There will be a couple of wounds I'll take out of
10 order, but generally I'll start from the head and work my way 16:31:30
11 down so we have some order.

12 Q. I'm holding here, for the record, knitting needles that are
13 approximately 18 to 20 -- probably about 18 inches long, and
14 they will be used to demonstrate the various trajectories.

15 A. There was one gunshot wound described on the right side of 16:31:51
16 the head.

17 And excuse me while I put the knitting needle through.

18 It went in the right side of the head. And this
19 projectile went through the scalp, went through the skull, went
20 through the right side of the brain, injured the right side of 16:32:17
21 the brain stem, went through the left side of the brain, went
22 through the left side of the skull. And the projectile was
23 recovered just underneath the scalp on the left side of the top
24 of the head.

25 So the pathway through the body -- everything is 16:32:34

—Emma Lew - Direct Examination—

1 relative to the body. So as you can see, the pathway through
2 the body is from back to front, right to left, and going up in
3 the body.

4 The next gunshot wound we'll talk about was on the
5 left side of the back of the head and neck area.

16:32:51

6 Now this gunshot wound, of course, went inside the
7 left side of the back of the head. It went through the soft
8 tissues of the face and came out the left cheek area.

9 So this pathway was from back to front, right to left,
10 and going upward in the body.

16:33:28

11 This one, of course, the first one we talked about,
12 having gone through the skull and the brain, was what we call
13 immediately incapacitating. And the victim is usually not able
14 to move after that. And death would occur within seconds to
15 minutes.

16:33:49

16 This gunshot wound that went through the fleshy parts
17 the face was not lethal.

18 The next wound I want to talk about goes in the left
19 upper back area. And Dr. Madrigal and Diaz were able to put in
20 their probe. And it went in going from back to front and right
21 to left. But they couldn't get any further because it hit the
22 spine.

16:34:11

23 Now from their internal examination to me I believe
24 the bullet struck the right side of several vertebra of the
25 spine, moving from the thoracic level, that's T8 up to T7, T6,

16:34:30

— Emma Lew - Direct Examination —

1 T5, and T4.

2 So inside the body, after striking the spine, the
3 bullet moved up. And the projectile was found above -- at the
4 bottom of the neck in that little groove right here.

5 (Indicating.) It did not fracture -- it did not fracture the 16:34:51
6 breast plate, it went up through the chest and ended up right
7 here where the bullet was recovered. (Indicating.)

8 Now, using common sense, having gone through the
9 chest, it went through the aorta, which is the largest artery
10 of the body coming direct out of the heart. 16:35:10

11 So this wound would have bled profusely internally,
12 but would not have been as immediately incapacitating in terms
13 of dying as the head wound. However, having struck the spine,
14 it would have injured the spinal cord and paralyzed him from
15 the waist down, or even higher. 16:35:35

16 So having received this shot, he would not remain
17 standing any longer, he would collapse.

18 The next wound I want to talk about was on the right
19 mid back.

20 Now, the doctors were able to tell that this pathway 16:35:54
21 was from back to front, right to left, and upward. And in
22 going through all the evidence, I found an exit wound -- or
23 they described an exit wound on the front of the left axilla or
24 the left armpit.

25 Q. Is that on this one? 16:36:12

~~Emma Lew - Direct Examination~~

1 A. Right here. This hole right here. (Indicating.)

2 So I've made -- this projectile went through the
3 chest, through both lungs most likely, because logic would tell
4 you --

5 Q. Do you need to get some water?

16:36:33

6 A. Okay. Logic tells us if it goes from one side of the body
7 to other, through the chest, it would go through both lungs.
8 And there is evidence of that. And the doctors did say that
9 there were perforations in the lungs.

10 Thank you.

16:36:53

11 Now I'm ready for the next wound.

12 Q. Okay.

13 A. Okay. So that was called number 6 in the report.

14 Now the next bullet I'm going to put right here.

15 (Indicating.) Again, this pathway was from back to front,
16 right to left, and going upward in the body.

16:37:18

17 And there was another exit wound on the left side of
18 the chest. And I believe that this bullet was the one that
19 exited the left side of the chest under the armpit.

20 There it is, right there. (Indicating.)

16:37:41

21 So you can see how these two pathways are more or less
22 parallel with the bullet, exiting here and here respectively.
23 (Indicating.)

24 Now the next one is -- this wound was on the left side
25 of the back. This pathway was from back to front and going

16:38:22

~~Emma Lew - Direct Examination~~

1 upward. I'm going to come back to this.

2 The next wound was also from back to front and going
3 upward. And I will come back to these wounds.

4 So let's go on with the next wound.

5 There was a gunshot wound on the back of the right
6 upper arm, and the doctors determined that it went from back to
7 front and upward in the body. 16:38:48

8 There was another wound on the left upper back,
9 about -- approximately here. (Indicating.) And this wound
10 went from back to front -- back to front, left to right and 16:39:11
11 upward. They found a projectile on the front of the left upper
12 arm that belonged to this pathway. And the doctors actually
13 identified this pathway. And they recovered that bullet from
14 the front of the left upper arm.

15 There was another gunshot wound on the back of the 16:39:42
16 left upper arm. And, again, the pathway was from back to front
17 and going upward in the body. They found a projectile under
18 the skin on the front of the left upper arm in the biceps area.

19 This is the projectile they recovered from this wound
20 on the left upper back. This projectile in the biceps area was 16:40:11
21 the one from the back of the left upper arm. (Indicating.)

22 Do we have all the gunshot wounds?

23 Okay. Now, in addition to the projectile here and
24 the projectile here that were recovered from this gunshot
25 wound on the left upper back and the left gunshot wound to the 16:40:49

—Emma Lew - Direct Examination—

1 left upper arm, there's an exit wound right here on the outside
2 of the left upper arm, and there's a projectile on the outside
3 of the left upper arm near the elbow that are not accounted
4 for.

5 I believe those are related to this gunshot wound 16:41:07
6 here, and this gunshot wound here. (Indicating.)

7 Now, when you look at the pathways of these two
8 gunshot wounds, it doesn't make sense that one would come out
9 the arm here and the projectile would end up here; correct? It
10 doesn't make sense. Until you raise the left upper arm. 16:41:28

11 Now, this mannequin is a bit stiff but, of course, you
12 in real life would be able to move your body and your shoulder
13 around a little bit. So, therefore, it is likely that this
14 wound on the left lower back went up this way and ended up
15 under the skin on the outside of the left upper arm. And this 16:41:55
16 one went up and actually came out the outside of the left upper
17 arm.

18 So with the arm raised like that, that explains how
19 these pathways going from back to front and upward ended up in
20 the left upper arm. 16:42:18

21 Q. Do you need assistance?

22 A. I think that's --

23 Q. That covers it?

24 A. That covers the gunshot wounds.

25 Q. So now would you like to show us how we could accomplish, 16:42:38

—Emma Lew - Direct Examination—

1 for example, this number 4 wound from the height you saw and
2 the -- on any of these wounds, frankly, from the height we saw
3 out at the crime scene down to where the victim was found?

4 A. This wound that strikes the spine I believe would have
5 caused immediate paralysis from the -- I guess, from the chest 16:43:00
6 level on down. So there would be no movement possible in the
7 legs.

8 And because there was injury to the spine from T8 up
9 to T4 level, I could tell the bullet was moving upward.

10 Especially when the pathologist found the bullet up here. 16:43:22

11 (Indicating.) So the pathway was going upward.

12 Now they were only able to determine back to front and
13 right to left because they hit bone, the projectile hit bone,
14 and they were not able to follow the track of the bullet inside
15 the body. 16:43:40

16 Now to accomplish this, it looks like it's going in
17 straight. However -- perhaps at this time we can put it on the
18 ground. And if you can put --

19 Okay. We can start off with him like that.

20 Q. So with this hypothetical -- can you hear me -- if the 16:44:24
21 person is running and bent slightly at the waist, are you able
22 to accomplish gunshot wound 4?

23 A. Yes. This one going into the spine would be consistent
24 with that scenario, because if you're running, you're not going
25 to be running like this, you're going to be running a little 16:44:42

—Emma Lew - Direct Examination—

1 bit more with your upper body bent over. Most people don't run
2 straight up like this.

3 And because he's running, he's got the momentum
4 already. So when the bullet strikes the spine and causes
5 paralysis, he's already moving forward and he lands on the
6 front of his body like this. (Indicating.)

16:44:59

7 Now we have evidence from the abrasions or the scrapes
8 on his -- on the left side of his face and scrapes on the backs
9 of his hands, that he landed face down on the left side of his
10 face and on top of his hands.

16:45:17

11 We can't really show that with the arms, we'd have
12 to take the arms off. But that's how this would be
13 accomplished.

14 MS. FELDMEIER: Would it help us if we moved the
15 mannequin backwards?

16:45:32

16 JUROR: Yes.

17 MS. FELDMEIER: All right. Let's do that.

18 BY MS. FELDMEIER:

19 Q. Okay. With gunshot wound 4 bringing the individual to the
20 ground --

16:45:53

21 A. Yes.

22 Q. -- and the left side of the face impacting the ground --

23 A. Yes.

24 Q. -- how does -- what position would the body need to be in
25 in order to accomplish the back wounds?

16:46:03

~~Emma Lew - Direct Examination~~

1 A. I think I'm going move to move it so --

2 Q. Oh, I see what you're doing.

3 A. -- he's facing the jury.

4 Q. Okay. So my question is, assuming the theory that number 4
5 brought the victim to the ground -- and you've just testified
6 about the abrasions to the face.

16:46:36

7 A. Yes.

8 Q. Would that be consistent with impact to pavement?

9 A. Yes, it would.

10 Q. And then there are also abrasions found on the underside of
11 the arms. What would that be consistent with, in your opinion?

16:46:46

12 A. That would be consistent with him, as he's pitching forward
13 and landing on the left side of his face, his arms were
14 underneath the body. So when he landed with his weight on his
15 hands, it scraped, resulted in abrasions or scrapes on the
16 backs of his hands.

16:47:06

17 Q. Now you've already testified that at this point he would
18 still have movement of his arms, voluntary movement. The
19 question is: Would -- when one receives such an impact to the
20 back, pitching them forward, is that something that the body
21 has enough time to make a conscious decision to try to protect
22 itself, or is it a reflexive action?

16:47:24

23 A. It's hard to say. Some people fall so fast they don't have
24 a chance to put out their arms.

25 In this case we have evidence he fell on the backs of

16:47:42

Emma Lew - Direct Examination

1 his hands because there were abrasions.

2 Now, after being down, these two wounds here that go
3 on the right side of the back, that go through the right lung
4 and the left lung, and come out -- come out here and on the
5 side of the chest, would have resulted in bleeding.

16:48:06

6 Now, you need time to bleed. It's not an instant
7 death. And the -- and Dr. Madrigal and Diaz found between
8 1,000 and 1500 milliliters of blood in the chest cavity. That
9 meant he was alive for a while in order for him to be bleeding
10 into his chest cavity.

16:48:32

11 Now keeping that in mind --

12 Q. Is there anything I can do to assist with adjusting?

13 A. Soon.

14 Q. Okay.

15 A. Now we have evidence already he fell on the left side of
16 his face and on the backs of his hands; right? But these two
17 wounds on the left side of back require that the left upper arm
18 be up. So after -- likely after he fell he was able to reach
19 out.

16:48:48

20 Q. Am I positioning this correctly, Dr. Lew?

16:49:11

21 A. Yes.

22 Q. Or would it be more like this?

23 A. It has to be like that.

24 But then, you look at these pathways, these are right
25 to left. Correct? These are more straight into the back. So

16:49:22

— Emma Lew - Direct Examination —

1 how do we explain that?

2 And we explain that by having him flat first. Okay,
3 bullets travel in a straight line. So if the gun was here, you
4 can see how this pathway and this pathway would be consistent
5 with his position. 16:49:44

6 It is not consistent with this position -- I'm
7 sorry -- this gunshot wound here or here because the gun is
8 over here. (Indicating.)

9 Now in order to make it consistent --

10 Q. Should I move that arm? 16:50:03

11 A. Because in order -- if you tilt him up a little bit, now
12 you can see how this gunshot wound and this gunshot wound is
13 consistent. (Indicating.)

14 Q. And where do those two exit?

15 A. Those are the ones that exited here, and the projectile 16:50:24
16 stayed here. (Indicating.)

17 Q. So in this mannequin it would be to this forearm area?

18 A. To the left upper arm.

19 Q. Okay.

20 A. So at some point Mr. Rodriguez was up on his right side 16:50:39
21 reaching with his left hand upward. That has to be the
22 situation to make the physical evidence what it is.

23 Q. Now you did review the crime scene photographs, and in that
24 the decedent is more flat; correct? And the arm is brought
25 back. 16:51:09

—Emma Lew - Direct Examination—

1 A. Yes.

2 Q. So what explains how the arm would go from this position to
3 the final resting position? Is that voluntary movement or
4 involuntary?

5 A. After receiving these two gunshot wounds where the bullets
6 end up in the left upper arm, the left arm has to be brought
7 back closer to the body, to its final resting position, as you
8 see in the crime scene photographs.

16:51:23

9 Q. Okay.

10 A. So there was movement in order to bring this arm that was
11 up here back to here. (Indicating.)

16:51:39

12 Q. And does that movement indicate life?

13 A. Yes. Because in order to receive these two gunshot wounds
14 he was up on his right side a little bit. And the physical
15 evidence that supports that is that there was a lot of blood on
16 the shirt associated with this gunshot wound to the spine, and
17 the blood was draining down to the right side. And that can be
18 explained by the body being up on the right side.

16:51:59

19 Q. Okay. So then how do you explain the fatal head shot
20 wound?

16:52:24

21 A. As I said before, and I'm sure Dr. Madrigal and Dr. Diaz
22 would have said so also, this gunshot wound through the head,
23 from right to left, and ending up on the left side of the top
24 of the head would be immediately incapacitating. In other
25 words, he would not remain standing.

16:52:42

~~Emma Lew - Direct Examination~~

1 And because it went through the brain and injured the
2 right side of the brain stem -- and the brain stem controls
3 heart rate and respiration -- death would occur within seconds,
4 or minutes, a couple minutes.

5 So in order for that to happen --

16:53:04

6 Q. Let me hold that while you work.

7 Actually this one will pick you up a lot better.

8 A. The terminal position of the head was turned slightly to
9 the left as you see here. In order for the gunshot wound to
10 occur on the right side of the head, that's not possible with
11 his head in that position.

16:53:34

12 So at some point while he was on the ground his head
13 had to have been -- his head had to have been in a position
14 where the right side of his face was facing the gun.

15 Q. And is it possible, Dr. Lew, that the right side of the
16 face could have been facing either from this hard position
17 where he slammed into the sidewalk, or in that lifted position
18 where he's rotating up, maybe lifting his head?

16:54:03

19 A. I suspect it was somewhat up, because after receiving this
20 shot, he would have collapsed. And in order for him to
21 collapse facing the other way, his head had to have been up and
22 maybe in the process of turning, so that after receiving the
23 shot, he just drops according to gravity.

16:54:25

24 Q. Okay. Do you have any other points that we could make with
25 this, or do you want to retake the stand?

16:54:47

~~Emma Lew - Direct Examination~~

1 A. This gunshot wound, although it looks bad because it's to
2 the back of the left of the head, I believe was one of the last
3 wounds sustained.

4 And if we put the head in its terminal position
5 facing to the left -- a little bit, yes. There wasn't a lot 16:55:04
6 of bleeding from this wound. Now where the bullet came out on
7 the left cheek, there was a dribble of blood going down
8 towards the pavement. And that tells me that he was already
9 face down on the pavement when he sustained this gunshot
10 wound. 16:55:34

11 And not only that, other evidence is that his shirt,
12 just below where this gunshot wound was, had two bullet holes.
13 And in order to have two bullet holes in the clothing
14 associated with this gunshot wound, the clothing, the fabric
15 was bunched up, so that the bullet went through several layers 16:55:53
16 of the T-shirt before striking the head.

17 And there was a little curved bruise underneath this
18 entrance wound, and that would have been very consistent with
19 the collar of the shirt.

20 Q. So you're saying that the collar of a cotton T-shirt could 16:56:12
21 cause a bruise on a body?

22 A. Yes, it can.

23 Q. You've seen this before?

24 A. Yes.

25 Q. Okay. 16:56:20

—Emma Lew - Direct Examination—

1 A. Usually it's jewelry and other things like that.

2 Q. Okay. So is there anything else about the body position
3 that we want to discuss?

4 Now, you're not saying that you can tell this jury, I
5 know out of ten shots this is one, this is two, this is three,
6 et cetera; correct? 16:56:40

7 A. No, that's not what I'm saying. I'm saying that certain
8 shots had to have come first, and other shots could not have
9 come --

10 Q. Ahead of those. 16:56:55

11 A. Yes.

12 Q. Yes. Okay.

13 So it's possible, for example, that these little back
14 arm shots that didn't cause terminal damage could have occurred
15 at any point in this procedure. 16:57:07

16 A. Yes, that is possible.

17 Q. Okay. And is it -- would it be accurate to say that this
18 entire movement -- giving you the hypothetical that the victim
19 hit the ground, and then eight full seconds passed before the
20 next volley of shots started, if I give you that hypothetical,
21 why does -- is eight seconds enough time for someone to get up
22 and run away? 16:57:27

23 A. Well, that's it. Most people, if they're not -- if they
24 fall forward, they're going to try and get up and move.

25 However, Mr. Rodriguez could not. And there is no evidence 16:57:45

~~Emma Lew - Direct Examination~~

1 that he moved below the waist, there was no movement at all,
2 whereas most people would try to get up and run off if they
3 were not injured in the spine like he was.

4 Q. So in addition to the forensic evidence you've shown us
5 about the upper body movement, did you also view the video in
6 this case? 16:58:03

7 A. Yes.

8 Q. And did you see movement?

9 A. I saw movement. I saw movement that would be consistent
10 with him up on the right side of his chest. And there's 16:58:12
11 movement of the left arm. And that would be entirely
12 consistent with these gunshot wounds to the left side of the
13 back, which ended up in the left upper arm.

14 Q. So do you have an opinion for this jury on whether or not
15 Mr. Elena was still alive after -- whatever first shot brought 16:58:32
16 him to the ground?

17 A. Yes, because there was movement of the head. He landed on
18 the left side of his face first, and then he was -- had to have
19 been in a position so that he could sustain the wound to the
20 right side of his head. 16:58:51

21 And finally he then rested in the final position on
22 the right side of his face, instead of when he first landed on
23 the left side of his face.

24 And then, of course, in order to sustain these two
25 gunshot wounds where the pathways were slightly different from 16:59:06

—Emma Lew - Direct Examination—

1 these two over here, he had to have been up on his right side,
2 and -- for the bullets from these two wounds to end up in the
3 left upper arm.

4 So there was movement after Mr. Rodriguez was on the
5 ground. 16:59:23

6 MS. FELDMEIER: Thank you, Dr. Lew.

7 If you want to retake the stand.

8 THE COURT: Can I see counsel for a second?

9 (At sidebar on the record.)

10 THE COURT: She's here for the night, I'm sure. So I 16:59:54
11 don't think there's any flights leaving Tucson tonight.

12 How much longer do you think you got?

13 MS. FELDMEIER: Just a little, short wrap up kind of
14 thing.

15 THE COURT: Do you want to talk to her tonight or do 17:00:06
16 you want to talk to her tomorrow?

17 MR. CHAPMAN: I'd rather wait.

18 MS. FELDMEIER: We'd like to get her on the 12:50
19 flight, she's -- there's a 12:50 flight tomorrow, to get her
20 out of here. 17:00:16

21 MR. CHAPMAN: I don't think I've spent more than 40
22 percent on cross yet.

23 MS. FELDMEIER: Right.

24 MR. CHAPMAN: Forty minutes on cross yet.

25 THE COURT: You are tired. 17:00:23

~~Emma Lew - Direct Examination~~

1 MR. CHAPMAN: Yeah.

2 THE COURT: All right. You want to finish it, we'll
3 stop.

4 MS. FELDMEIER: We'll stop here.

5 (End of discussion at sidebar.)

17:00:47

6 THE COURT: Go ahead. Don't mind us.

7 MS. FELDMEIER: This is a good stopping point for the
8 Government, Your Honor.

9 THE COURT: I thought you said you had a few more
10 questions.

17:00:54

11 MS. FELDMEIER: I'd rather do them in the morning.

12 THE COURT: 9:30 in the morning.

13 But before you leave, there is a -- I'll tell you
14 exactly what it is -- a teacher's rally outside the building.

15 So please take your juror badges off when you leave outside the
16 building. I think it's teachers wear red or something like
17 that. That's what's going on outside. So take your badges off
18 when you go outside the building.

17:01:30

19 We'll start tomorrow morning at 9:30.

20 Remember -- before you leave. I'm not through. I've
21 got lots to say.

17:01:53

22 We'll start tomorrow at 9:30. We will not have court
23 on Friday. We will have court Monday, Tuesday, Wednesday,
24 Thursday of next week. Okay?

25 Remember the admonitions; no news, no research, no

17:02:14

~~Emma Lew - Direct Examination~~

1 investigation, no discussing the case, no making up your mind.

2 See you tomorrow morning at 9:30.

3 (Jury out at 5:02 p.m.)

4 (Further proceedings held on the record not included in
5 this transcript.)

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~~CR-15-1723-TUC-RCC - April 4, 2018~~

C E R T I F I C A T E

I, CANDY L. POTTER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 5th day of April, 2018.

s/Candy L. Potter
Candy L. Potter, RMR, CRR